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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mark Brnovich, in his official capacity as
Attorney General of Arizona; the State of
Arizona,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as
President of the United States; Alejandro
Mayorkas in his official capacity as
Secretary of Homeland Security; United
States Department of Homeland Security;
Troy Miller in his official capacity as
Senior Official Performing the Duties of
the Commissioner of U.S. Customs and
Border Protection; Tae Johnson in his
official capacity as Senior Official
Performing the Duties of Director of U.S.
Immigration and Customs Enforcement;
Ur M. Jaddou in her official capacity as
Director of U.S. Citizenship and
Immigration Services; the United States
of America

Defendants.

No. 2:21-cv-01568-MTL

**PLAINTIFFS' SUPPLEMENTAL
PLEADING**

INTRODUCTION

1. The Southwest border is in crisis, with record numbers of migrants illegally entering our country. In President Trump’s last full month in office, Border Patrol released 17 migrants caught at the border into the interior of the United States. In September 2022, President Biden’s Border Patrol released 104,957. Every month, the Biden Administration has consistently been releasing through parole—unlawfully—tens of thousands of aliens into the United States. And the volume of these illegal parole grants is accelerating rather than abating.¹

2. Between January and November 2021, Defendants were not only unlawfully releasing aliens, but further were frequently refusing to initiate immigration court proceedings as required by law.² Instead of issuing charging documents to aliens before (unlawfully) releasing them, DHS was issuing something called a “notice to report,” essentially a bare entreaty for the alien to turn himself in at a later date. This practice—which is not authorized by any statute or regulation—was described in “[g]uidance sent to border patrol . . . from agency leadership,” and was based on an unprecedented assertion of “prosecutorial discretion” to flout the requirements of the immigration laws.³

¹ Defendant Customs and Border Protection reports these numbers on its website. Numbers for FY2022 are available at <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>, and numbers for FY2021 are available at <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2021#>. The numbers were calculated using the “U.S. Border Patrol – Dispositions and Transfers” tab and combining the “Notice to Appear/Order of Recognizance” and “Parole + ATD” rows. (The “Parole + ATD” row is only used in FY2022.)

² Stef W. Kight, *Scoop: 50,000 migrants released; few report to ICE*, AXIOS (July 27, 2021), <https://www.axios.com/migrant-release-no-court-date-ice-dhs-immigration-33d258ea-2419-418d-abe8-2a8b60e3c070.html>.

³ Stef W. Kight, *Rio Grande Valley border patrol releasing migrants without court date*, AXIOS (Mar. 22, 2021), <https://www.axios.com/border-patrol-rio-grande-valley-release-migrant-families-67e8cdc1-d549-47e1-aba3-8baca26025d8.html>.

1 3. After Arizona filed this suit and Florida filed a similar suit, DHS realized it
 2 could not defend that practice. On November 2, 2021, the government issued a new memo
 3 (the “November Memo”), the existence of which it only made public, reluctantly, to defend
 4 this and other similar litigation. (*See* Doc. 146 at 4 (Defendants’ Motion to Dismiss citing
 5 memo as reason for dismissal, but not attaching memo as exhibit) and Doc. 167-1
 6 (Plaintiffs’ Response, attaching memo as exhibit, which is designated as “law enforcement
 7 sensitive”). The memo states that, “[e]ffective immediately, [Border Patrol] is ceasing the
 8 use of” notices to report. (Doc. 167-1 at 2.)

9 4. The November Memo, however, does little more than effect changes in
 10 nomenclature. The government has replaced notices to report with a policy called
 11 “Parole+ATD” or “Parole and Alternative to Detention.” *Id.* The Parole+ATD policy still
 12 involves releasing aliens subject to mandatory detention without initiating removal
 13 proceedings as mandated by federal law. But unlike with the notice to report policy, where
 14 DHS could point to no supporting statutory authority whatsoever, the government now
 15 relies on an untenable reading of its parole authority in 8 U.S.C. § 1182.

16 5. Parole “authority is not unbounded: DHS may exercise its discretion to
 17 parole applicants ‘only on a case-by-case basis for urgent humanitarian reasons or
 18 significant public benefit.’” *Biden v. Texas*, 142 S. Ct. 2528, 2543 (2022) (quoting 8 U.S.C.
 19 §1182(d)(5)(A)). DHS “cannot use that power to parole aliens *en masse*,”⁴ which is
 20 *precisely* what the Parole+ATD policy amounts to. While the memo implies that this
 21 “alternative path” will be used sparingly, (Doc. 167-1 at 2), implementation data shows
 22

23
 24 ⁴ *Texas v. Biden*, 20 F.4th 928, 997 (5th Cir. 2021) *rev’d in part on other grounds Biden*,
 25 142 S.Ct. at 2528.

1 otherwise: DHS paroled 18,191⁵ migrants in December 2021 using the Parole+ATD
2 policy. That amount constituted more than *three quarters* of all parole grants by DHS that
3 month, which totaled 23,098 in all.⁶

4 6. This pattern has held for every subsequent month: the vast majority of aliens
5 that Defendants parole into the United States are through the Parole+ATD program.
6 According to the federal government's own reports, DHS paroled 321,888 aliens between
7 November 2021 and June 2022.⁷ That number has been growing. In September 2022, the
8 federal government released 95,191 aliens into the United States through Parole+ATD, and
9 released another 9,766 with Notices to Appear on their own recognizance (upon
10 information and belief, most of these aliens were also paroled into the United States).⁸

11 7. As part of litigation in Texas, the federal government produced monthly
12 reports from August 2021 through June 2022 that disclosed the number of alien parolees,
13 which show these enormous increases in parole grants. Similarly, somewhat-less-precise
14 public statistics from Customs and Border Protection indicate that the number of aliens
15 paroled into the United States since Arizona filed its First Amended Complaint is now
16 more than *half a million*.

17 8. Taking the challenged policies together, the government is violating clear
18 congressional commands tens of thousands of times per month—and more than 100,000
19 times in September 2022. It has claimed that it lacks the resources and detention capacity
20 to process and detain the surge of migrants arriving at the border. But if that is true, it is
21 only because the Biden Administration has tied its own hands behind its back.

22
23 ⁵ <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>

24 ⁶ *Texas v. Biden* (“*Texas MPP*”), No. 21-cv-00067, ECF. 124 (N.D. Tex. Jan. 14, 2022)

25 ⁷ *See Texas MPP*, ECF Nos. 119, 124, 129, 133, 136, 139, 140, and 143

26 ⁸ *Id.*

1 9. For example, the government has flatly refused to use its power under
 2 § 1225(b)(2)(C) to “return . . . alien[s]” who “arriv[e] on land . . . from a foreign territory
 3 contiguous to the United States . . . to that territory pending” immigration proceedings. As
 4 the Fifth Circuit recently held, Defendants simply “don’t want to do [the] one thing
 5 Congress allowed” as an alternative to detention. *Texas v. Biden*, 20 F.4th at 996. They
 6 have instead terminated the program under that provision—known as the “Migrant
 7 Protection Protocols” or the “wait in Mexico policy”—even though that program was
 8 “effective[]” and an “indispensable tool.” See *Texas v. Biden*, 2021 WL 3603341 at *5
 9 (discussing an October 2019 assessment of that program, in which the government found
 10 this policy “effective[]” and an “indispensable tool in addressing the ongoing crisis at the
 11 southern border”).

12 10. Even more astonishingly, at the same time that the Administration was
 13 claiming that it lacked sufficient detention capacity for aliens, and thus that it had no
 14 alternative but to parole aliens into the country *en masse*, Federal Defendants submitted a
 15 budget request to Congress that would decrease DHS’s alien detention capacity by 25%.⁹
 16 The federal government further affirmatively degraded its own detention capacity by
 17 cancelling contracts with private detention facilities and by closing detention facilities.¹⁰

18 11. In addition, even where DHS has capacity, it has often failed to utilize it. For
 19 example, an April 12, 2022 DHS Inspector General Report explains how DHS acquired
 20 detention capacity from hotels through no-bid contracts and then inexplicably failed to use
 21 it: indeed, DHS “spent approximately \$17 million for hotel space and services at six hotels
 22

23 ⁹ Eileen Sullivan, *Biden to Ask Congress for 9,000 Fewer Immigration Detention Beds*,
 NEW YORK TIMES (Mar. 25, 2022), <https://nyti.ms/3vOI00F>.

24 ¹⁰ *Id.*; Priscilla Alvarez, *Biden administration to close two immigration detention centers*
 25 *that came under scrutiny*, CNN (May 20, 2021), <https://cnn.it/3KcxGol>.

1 that went largely unused between April and June 2021” and “did not adequately justify the
 2 need for the sole source contract to house migrant families.”¹¹ Moreover, DHS has entered
 3 into settlement agreements with ideologically aligned groups to hobble its detention
 4 capacity further.¹²

5 12. Thus, while DHS’s Parole+ATD policy is premised on a putative shortage in
 6 detention capacity, that rationale “calls to mind the man sentenced to death for killing his
 7 parents, who pleads for mercy on the ground that he is an orphan.” *Glossip v. Gross*, 576
 8 U.S. 863, 898 (2015) (Scalia, J., concurring).

9 13. To top it off, this Administration’s misguided—and frequently *unlawful*—
 10 policies are the cause of the surge at the border in the first place. The actions of the
 11 President, Secretary Mayorkas, and other Administration officials have made clear that the
 12 intent of the Administration’s immigration policies is to incentivize illegal immigration. In
 13 2019, then-candidate Biden committed to providing free government-provided health care
 14 to aliens unlawfully present in the United States.¹³ Indeed, that the Administration’s
 15 immigration policies incentivize high amounts of illegal immigration is widely recognized
 16

17 ¹¹ DHS Off. of Inspector Gen., *ICE Spent Funds on Unused Beds, Missed COVID-19*
 18 *Protocols and Detention Standards while Housing Migrant Families in Hotels* at 3, 5 (April
 19 12, 2022) [https://www.oig.dhs.gov/sites/default/files/assets/2022-04/OIG-22-37-
 Apr22.pdf](https://www.oig.dhs.gov/sites/default/files/assets/2022-04/OIG-22-37-Apr22.pdf).

20 ¹² See, e.g., Rae Ann Varona, *ICE Agrees To Restrictions In COVID-19 Hot Spot*
 21 *Settlement*, LAW360 (July 7, 2022), [https://www.law360.com/articles/1509393/ice-agrees-
 to-restrictions-in-covid-19-hot-spot-settlement](https://www.law360.com/articles/1509393/ice-agrees-to-restrictions-in-covid-19-hot-spot-settlement).

22 ¹³ Alexander Bolton, “All candidates raise hands on giving health care to undocumented
 23 immigrants,” *The Hill* (Jun. 27, 2019), [https://thehill.com/homenews/campaign/450797-
 all-candidates-raise-hands-on-giving-health-care-to-undocumented-immigrants/](https://thehill.com/homenews/campaign/450797-all-candidates-raise-hands-on-giving-health-care-to-undocumented-immigrants/);
 24 Washington Post, “Where Democrats Stand: Do you believe all undocumented immigrants
 25 should be covered under a government-run health plan?”,
 26 [https://www.washingtonpost.com/graphics/politics/policy-2020/medicare-for-
 all/undocumented-immigrant-health-care/](https://www.washingtonpost.com/graphics/politics/policy-2020/medicare-for-all/undocumented-immigrant-health-care/)

1 internationally. For example, the President of Mexico called President Biden the “migrant
 2 president” and observed that the Biden Administration’s policies and rhetoric greatly
 3 incentivize illegal immigration.¹⁴ Human traffickers have recognized this as well. Internal
 4 Mexican government assessments “state that gangs are diversifying methods of smuggling
 5 and winning clients as they eye U.S. measures that will ‘incentivize migration.’”¹⁵

6 14. The Biden Administration continues to publicly tout its lax border policies.
 7 As Defendant Secretary Mayorkas recently boasted, “[u]nlawful presence in the United
 8 States will alone not be a basis for an immigration enforcement action.”¹⁶ The Biden
 9 Administration is not *unable* to control the border; it is *unwilling* to do so.

10 15. With respect to the Non-Detention Policy, the government insists that “no
 11 such ‘policy’ exists.” (Doc. 146 at 25.) Discovery will show the opposite. In any event, the
 12 government does not deny that it is releasing and paroling arriving migrants by the tens of
 13 thousands, and the government cannot avoid judicial review of its widespread and unlawful
 14 practices by refusing to put them in writing (or, alternatively, committing them to writing
 15 but keeping them secret). *See Bhd. of Locomotive Eng’rs & Trainmen v. Fed. R.R. Admin.*,
 16 972 F.3d 83, 100 (D.C. Cir. 2020) (collecting authorities establishing that unwritten
 17 policies are subject to APA review); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 339–42
 18 (D.D.C. 2018) (reasoning that a court may infer the existence of an immigration policy
 19 where the facts suggest that one exists).

22 ¹⁴ Dave Graham, “Exclusive: ‘Migrant president’ Biden stirs Mexican angst over boom time
 23 for gangs,” Reuters, Mar. 10, 2021, <https://www.reuters.com/article/us-usa-immigration-mexico-exclusive-idUSKBN2B21D8>.

24 ¹⁵ *Id.*

25 ¹⁶ *Secretary Mayorkas Delivers Remarks at the U.S. Conference of Mayors, U.S. Dep’t of*
 26 *Homeland Security* (Jan. 20, 2022), <https://www.dhs.gov/news/2022/01/20/secretary-mayorkas-delivers-remarks-us-conference-mayors>, but it has since been removed.

The Scott Memo

16. In approximately June 2021, then-Chief Rodney S. Scott of the U.S. Border Patrol wrote a memo (the “Scott Memo”) to Defendant Troy A. Miller, who is the Senior Official Performing the Duties of the Commissioner U.S. Customs and Border Protection. The subject line of the Scott Memo was “Notice to Report.” The Scott Memo was produced to the State of Florida on September 30, 2022 pursuant to a FOIA request.

17. The Scott Memo sets forth DHS’s position that Border Patrol agents putatively “retain discretion” regarding whether to “place . . . migrants in [removal] proceedings.” The document also states that “persons will be *released* in accordance with local sector protocols to the fullest extent possible.” (emphasis added).

18. In other words, the document contemplates and authorizes the commission of the very violations of 8 U.S.C. § 1225 that Arizona has long alleged are taking place. Belying the government’s claims that the Non-Detention and Parole Policies are subject to officer discretion and case-by-case review, the Scott Memo affirms that “USBP *will* issue a[n] NTR when at least one of the following triggers are met” (emphasis added). DHS, however, redacted the list of triggers that compel mandatory issuance of an NTR.

19. The Scott Memo proves that at the same time Defendants were implementing their Non-Detention and Parole Policies, the Chief of Border Patrol believed there was a preference to release migrants in a manner identically consistent with Plaintiffs’ allegations about the Policies, and that DHS was willing to break the law to implement those preferences.

The November Memo

20. The November Memo claims to rescind the government’s notice to report policy and replace it with the Parole+ATD policy. That policy still involves releasing aliens in violation of the mandatory detention requirements and without initiating removal

1 proceedings, but now doubles down on the government’s misuse of its parole authority in
 2 § 1182. November Memo at 2 (expressly invoking that authority).

3 21. According to the November memo, § 1182’s “urgent humanitarian reasons
 4 or significant public benefit” condition is satisfied by the “need to protect the workforce,
 5 migrants, and American public against the spread of COVID-19 that may be exacerbated
 6 by overcrowding in CBP facilities.” *Id.* at 2.

7 22. In other words, the government is claiming that any time “capacity
 8 constraints or conditions in custody warrant . . . more expeditious” processing, it can ignore
 9 the requirements of the immigration laws because those conditions present either “urgent
 10 humanitarian reasons” or a “significant public benefit” justifying parole. *Id.*; 8 U.S.C.
 11 § 1182(d)(5)(A).

12 **DHS Alters Parole+ATD Through Unwritten Policies, then Issues the July Memo**
 13 **After-the-Fact Once it Gets Caught**

14 23. After issuing the November memo, the government began using the
 15 Parole+ATD policy in manners inconsistent with the November memo. For example, the
 16 November Memo authorizes Parole+ATD only for family units (“FMUs”): “USBP may
 17 consider use of Parole+ ATD on a case-by-case basis for FMUs when certain conditions,
 18 laid out below, exist.” November Memo at 2.

19 24. Discovery has commenced in a case raising claims similar to those here, in
 20 *Florida. v. United States*, No. 21-CV-1066 (N.D. Fla. 2021). During the July 13, 2022
 21 deposition of U.S. Border Patrol’s Acting Chief of Operations, Tony Barker, it was
 22 revealed that the actual policy was different than the written one. Chief Barker disclosed
 23 during his deposition that the Parole+ATD policy had been expanded to apply to single
 24 adults as well, and that this change had been implemented a “couple months” earlier. Five
 25 days after this major departure from the July Memo change came to light—in other words,
 26 five days after DHS had been caught red-handed violating its own policy—DHS issued a

1 second Parole+ATD memo on July 18, 2022 (the “July Memo”) expanding Parole+ATD
2 to apply also to individuals. (Doc. 216-2.)

3 **The Non-Detention and Parole Policies Include Unwritten Elements**

4 25. During Florida’s July 28, 2022 deposition of U.S. Border Patrol Chief Raul
5 Ortiz—just ten days after DHS issued the July Memo—Chief Ortiz made a number of
6 admissions in his deposition that provide concrete evidence confirming the State’s
7 allegations about the existence of the Parole and Non-Detention Policies, and that the
8 Policies were often not committed to formal memos, or even to writing at all. *See id.*, ECF
9 No. 78-3 (Deposition of Raul Ortiz, Chief of the U.S. Border Patrol, “Ortiz Depo.”)

10 26. Chief Ortiz confirmed that, under the Trump Administration, agents’ ability
11 to release aliens or to parole them was only allowed in “very exigent circumstances,” such
12 as for medical or humanitarian reasons. *Id.* at 173:13-174:7.

13 27. Chief Ortiz also confirmed that when the Biden Administration took office,
14 the new Parole Policy was initially communicated “telephonically or through e-mail
15 coordination between Border Patrol headquarters and the sector.” *Id.* at 174:9-176:10.

16 28. He went on to explain that when the Parole Policy was expanded beyond the
17 first sector where it had been imposed, there were two ways it was communicated: “Every
18 Tuesday we have a chiefs’ call where we coordinate directly with the sector chiefs and the
19 deputy chiefs. And then the operations directorate would also communicate with the sectors
20 if there were specific issues centered around coordination, operational coordination that
21 had to happen.” *Id.* at 176:20-177:8. He also admitted that, even after DHS had issued its
22 formal Parole+ATD memo, changes to the policy were communicated by email. *Id.* at
23 224:22-225:11.

24 29. Under the first iteration of the Parole and Non-Detention Policy, when DHS
25 was issuing Notices to Report (“NTRs”), Chief Ortiz testified that guidance about NTRs
26 “was sent out and distributed through multiple platforms. Initially we had a telephonic call

1 with all the associate chiefs. We also asked that the operations directorate send out a[n] e-
 2 mail to the sector points of contact, which would have been an assistant chief at those
 3 sectors, to include the sector chiefs.” *Id.* at 198:5-15. He also claimed that he believed a
 4 memorandum had been issued as well, but admitted that he had been unable to find a copy
 5 of it, and counsel for Florida affirmed that no such memorandum had been produced to
 6 Florida. *Id.* at 198:15-20.

7 30. Most importantly, Chief Ortiz affirmed that the Parole+ATD policy was a
 8 programmatic policy such that, once numerical thresholds for illegal border crossings had
 9 been reached, the policy required categorical grant of parole to *all* aliens covered by the
 10 policy: “Q. Okay. So if the Rio Grande Valley or Del Rio hit the thresholds that are laid
 11 out in the second page of this document ... *all* family units would be paroled plus ATD,
 12 correct? ... A. *All* family units minus Central Americans and Mexican family units.” *Id.* at
 13 212:4-10 (emphasis added).

14 31. Chief Ortiz’s deposition testimony confirms the central elements of the
 15 State’s allegations in this case: the Parole and Non-Detention Policies exist; they were not
 16 necessarily memorialized in formal memos, or even in writing at all; and the Policy
 17 imposed mandatory requirements on DHS agents, removing their discretion to grant parole
 18 on a “only on a case-by-case basis for urgent humanitarian reasons or significant public
 19 benefit,” 8 U.S.C. § 1182(d)(5)(A), and instead requiring that *all* aliens in certain
 20 categories be paroled.

21 **The Challenged Policies Harm the State**

22 32. The Non-Detention and Parole Policies harm Arizona. The Biden
 23 Administration is releasing tens of thousands of migrants at the border every month. Many
 24 of these migrants are arriving or will arrive in Arizona, harming the State’s sovereign and
 25 proprietary interests and forcing it to incur millions of dollars in expenses.

26 33. Despite all this, in its motion to dismiss, the government argues that any harm

1 to Arizona from the challenged policies is based only on “speculating.” (Doc. 146 at 6.)
 2 That is a remarkable statement. Arizona spends millions per year just on incarcerating
 3 aliens unlawfully present in the U.S. generally (and the State specifically), who commit
 4 crimes within Arizona’s borders. And Arizona spends millions of dollars providing public
 5 services and benefits to immigrants unlawfully present in the United States, including
 6 education and healthcare services.

7 34. During discovery in *Florida*, the federal government produced information
 8 about aliens released into the United States who listed Florida addresses as their intended
 9 place of residence, including statistics about how many aliens had failed to check in with
 10 DHS for further processing. *See* Ortiz Depo. at 146:9-148:21. DHS’s own statistics show
 11 that the number of Florida-bound aliens who have absconded after being issued a Notice
 12 to Report or allowed into the United States under Parole+ATD currently stands at close to
 13 50,000. During Florida’s deposition of U.S. Border Patrol Chief Raul Ortiz, Chief Ortiz
 14 admitted that this was “a large number” that was “concerning.” *Id.* at 148:11-14.

15 35. The State fully expects that further discovery in this case will show a
 16 similar—or larger—number for Arizona. (Federal Defendants would of course know now
 17 but are not forthcoming with that data.) Furthermore, under federal law, aliens who have
 18 been paroled into the United States become eligible for a variety of State benefits after five
 19 years.¹⁷ These State benefits, which impose significant costs on the State, include
 20

21
 22 ¹⁷ *See* 8 U.S.C.A. § 1641(b)(4) (defining a “qualified alien” as “an alien who is paroled
 23 into the United States under [8 U.S.C. § 1182(d)(5)] for a period of at least 1 year”); 8
 24 U.S.C. § 1612 (2)(L) (making eligible for food stamps aliens who have been “‘qualified
 25 aliens’ for a period of 5 years or more”); 8 U.S.C. § 1613(a) (making qualified aliens
 26 eligible for “any Federal means-tested public benefit ... 5 years” after “the date of the alien's
 entry into the United States”).

AHCCS/Medicaid¹⁸; Nutrition Assistance/SNAP (commonly referred to as “food stamps”)¹⁹; and Cash Assistance/TANF (commonly referred to as welfare payments).²⁰

36. The number of parolees in Arizona will cause quantifiable financial harm to the State, and the exact magnitude of those harms will become clear in discovery, when the federal government produces statistics about the number of aliens settling in Arizona. For present purposes, however, that matters little as even “a dollar or two” of injury satisfies Article III. *Sprint Commc’ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008).

37. Discovery from *Florida* provides additional evidence of the State’s harm. At his deposition, Border Patrol Chief Ortiz admitted that “the southern border is currently in crisis” and that “the crisis that is currently ongoing at the southern border [is] making the border less safe for Americans and aliens alike.” Ortiz Depo. at 40:18-21, 53:9-13. This decrease in safety causes harm to Arizona, including increased law enforcement costs.

¹⁸ See also Arizona Health Care Cost Containment System (“AHCCCS”), Medical Assistance Eligibility Policy Manual §§ 524A and 524B (defining “qualified noncitizen” to include “[p]arolee[s] for at least one year” and making such parolees eligible for benefits after the alien “[h]as been a qualified noncitizen for at least five years”)

https://azahcccs.gov/Resources/guidesmanualspolicies/eligibilitypolicy/eligibilitypolicymanual/#t=Policy%2FChapter_500_Non-Financial_Conditions_of_Eligibility%2F524_NonCitizen_Status%2FA_Overview.htm and https://azahcccs.gov/Resources/guidesmanualspolicies/eligibilitypolicy/eligibilitypolicymanual/#t=Policy%2FChapter_500_Non-Financial_Conditions_of_Eligibility%2F524_NonCitizen_Status%2F524B.htm.

¹⁹ Ariz. Dep’t of Econ. Sec., Cash and Nutrition Assistance Policy Manual, § FAA3.D(04)(B), https://dbmefapolicy.azdes.gov/#page/FAA3/Qualified_Noncitizens.html (“To be potentially eligible for [Nutrition Assistance]” sliens are required” to have been in parole status “for at least one year” and have been granted parole under 8 U.S.C. § 1182(d)5(A)).

²⁰ Ariz. Admin. Code § R6-12-305 (making eligible for Cash Assistance (TANF) “a noncitizen legal alien who satisfies the requirements of [8 U.S.C. § 1641]”).

1 38. Chief Ortiz also admitted that since President Biden’s election, the number
2 of aliens attempting illegally to enter the United States has increased, and that internal
3 Customs and Border Patrol documents state that “since President Biden was elected ...
4 aliens illegally entering the United States perceive that they will be able to enter and remain
5 in the United States.” *Id.* at 59:12-60:5. Chief Ortiz agreed that “aliens who cite favorable
6 immigration policy as a reason to come to the United States are perceiving what actually
7 is happening in the United States.” *Id.* at 67:22-68:5.

8 39. Chief Ortiz also explained that it is important to detain and remove aliens
9 who illegally enter the United States, because when there are no consequences, the number
10 of illegal crossings increases; that “if migrant populations are told that there’s a potential
11 that they may be released, that yes, you can see increases [in illegal crossings]”; and that if
12 DHS is not detaining and removing aliens who cross illegally, the flow of illegal crossers
13 “will increase.” *Id.* at 171:13-172:9, 173:7-12.

14 40. Chief Ortiz confirmed that the Biden Administration has affirmatively and
15 intentionally decreased ICE’s detention capacity and also eliminated other processing
16 pathways for aliens. *Id.* at 233:9-17. He further agreed with the statement that “each one of
17 those decisions [to degrade detention capacity and eliminate processing pathways] in the
18 midst of a historic flood of aliens to the southern border increased the pressure on Border
19 Patrol and its limited capacity” and that “as that pressure built, there’s no other choice
20 other than to release [aliens].” *Id.* at 233:18-234:5. Ortiz affirmed that the decrease in ICE’s
21 detention capacity impacts Border Patrol. *Id.* at 33:3-16. He also admitted that, if ICE had
22 not degraded its detention capacity, it would have taken pressure off of Border Patrol,
23 allowing it to transfer more aliens to ICE for detention, rather than paroling them into the
24 United States. *Id.* at 231:17-232:19.

25 41. Chief Ortiz went on to admit that criminal trafficking organizations
26 incentivized by the Parole and Non-Detention Policy “are putting ... border communities

1 in danger,” such as by locating “stash houses in neighborhoods” and causing “damage to
 2 property [of] ranchers and farmers,” including damage to “fences” and “livestock that are
 3 lost when these smugglers drive through their property,” and that they “have little regard
 4 for the safety of the community out there.” *Id.* at 241:6-242:3.

5 42. All of these admissions confirm the extensive injuries to Arizona and to its
 6 sovereign, quasi-sovereign, and proprietary interests that Defendants’ challenged policies
 7 are inflicting.

8 43. Chief Ortiz further admitted that criminal trafficking organizations “continue
 9 to flood the border area with ... narcotics... We've had more agents assaulted this year than
 10 we ever have, and we continue to see increase in firearm seizures.” *Id.* at 243:7-9, 15-17.
 11 Chief Ortiz disclosed that these policies disproportionately harm Arizona specifically,
 12 expressly stating that the Tucson Border Patrol sector is one of the two sectors “where we
 13 see the criminal organizations, smuggling organizations operating at a higher level.” Ortiz
 14 Depo. at 83:10-13. The Parole and Non-Detention Policy is thus causing increased crime
 15 in Arizona, and causing increased law-enforcement costs to the State.

16 **The Parole+ATD Policy Violates Counts IX-XIII of the Third Amended Complaint**

17 44. Parole+ATD is a new name for the same prior Non-Detention and Parole
 18 Policies that Defendants first instantiated through their unlawful policy of issuing “Notices
 19 to Report.” The Parole+ATD policy thus violates Counts IX-XIII of the Third Amended
 20 Complaint (“TAC”) for the same reasons articulated in the TAC. (Doc. 134 ¶¶ 216-234.)²¹

21 45. More specifically, the Parole+ATD policy is unlawful because the
 22 government cannot parole aliens *en masse*, and none of its rationales satisfy the
 23 exceedingly high standards in 8 U.S.C. § 1182. Because this policy is not a valid exercise
 24

25 ²¹ On September 22, 2022 this court dismissed Count XIII of the TAC. (*See* Doc. at 24-
 26 27.) Plaintiffs do not seek reconsideration of that ruling and include allegations about
 Count XIII in this supplemental pleading solely for the purpose of preserving their rights
 on appeal.

1 of the government's § 1182 power, it violates the mandatory detention provisions in §
2 1225.

3 46. The government insists that "no such 'policy' exists." (Doc. 146 at 26.) But
4 the facts overwhelmingly suggest otherwise, which means that the government is either
5 withholding the written policy in bad faith, or it has not reduced it to writing. If it is the
6 latter, that means the government has implemented this policy without offering any
7 reasoning in support of it, which is per se arbitrary and capricious.

8 47. In implementing the policy, Defendants not only ignored the State's reliance
9 interests, but also ignored an important aspect of the problem because they did not consider
10 the high rate at which those who are released abscond and do not show up to their
11 immigration proceedings.

12 48. And insofar as Defendants claim their policies are justified by resource
13 constraints, this rationale is pretextual given the Biden Administration's intentional actions
14 to reduce immigration resources and detention capacity. *See Dep't of Com. v. New York*,
15 139 S. Ct. 2551, 2573–74 (2019). And the government's reliance on the COVID-19
16 pandemic is farfetched, given that it simultaneously claims the power to exclude
17 immigrants wholesale to guard public health against the same pandemic. (*See infra* ¶ 55.)

18 49. The November Memo and the July Memos are arbitrary and capricious and
19 should be set aside for many reasons, including that they ignore costs to the State, *Michigan*
20 *v. EPA*, 576 U.S. 743, 752–53 (2015), and neither accounts for reliance interests nor
21 considers lesser alternatives, *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891,
22 1913 (2020).

23 50. The November Memo and the July Memo also fail to provide any reasoned
24 explanation for their policy change, a per se violation of administrative law's reason-giving
25 requirements. *See New York*, 139 S. Ct. at 2575–76 ("The reasoned explanation
26 requirement . . . is meant to ensure that agencies offer genuine justifications for important

1 decisions, reasons that can be scrutinized by courts and the interested public.”); *Encino*
2 *Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (“Agencies are free to change their
3 existing policies as long as they provide a reasoned explanation for the change.”).

4 51. DHS also did not consider the degree to which those subject to Parole+ATD
5 will not report to an ICE facility as they are directed to do; it did not consider whether to
6 increase detention capacity or reopen family detention centers; and it did not consider
7 whether the Parole+ATD policy is creating a perception among potential migrants that
8 traveling to the border will result in release into the interior and therefore whether the
9 policy is exacerbating the border crisis.

10 52. Further, the memo’s claim that overcrowding and lack of resources satisfy
11 the “urgent humanitarian reasons or significant public benefit” requirement violates 8
12 U.S.C. § 1182(d)(5)(A) or, alternatively, is an unreasonable construction of it.

13 53. Even if the government’s understanding of “urgent humanitarian reasons” or
14 “significant public benefit” were accurate (it is not), Parole+ATD fails to satisfy the “case-
15 by-case” requirement. See 8 U.S.C. § 1182(d)(5)(A). For example, the Biden
16 Administration released 95,191 aliens in September 2022 using Parole+ATD. Granting
17 parole 3,173 times every day is not what Congress had in mind when it amended that
18 provision to add the case-by-case requirement. *See Cruz-Miguel v. Holder*, 650 F.3d 189,
19 199 n.15 (2d Cir. 2011) (explaining that “this change was animated by concern that parole
20 under § 1182(d)(5)(A) was being used by the executive to circumvent congressionally
21 established immigration policy”).

22 54. Moreover, the Parole+ATD policy is a clear attempt to continue the notice to
23 report policy of declining to issue charging documents. Specifically, “as a condition of
24 their parole,” individuals processed using Parole+ATD are “required to report to ICE
25 within 15 days to be processed for” a notice to appear. November Memo at 2.
26

1 55. DHS’s rationale regarding the “need to protect the workforce, migrants, and
2 American public against the spread of COVID-19 that may be exacerbated by
3 overcrowding in CBP facilities,” November Memo at 2, is an implausible basis for the
4 Parole+ATD policy given the CDC’s Title 42 Order, which addresses those concerns and
5 which this Administration has not taken full advantage of. *See* Order Suspending the Right
6 To Introduce Certain Persons From Countries Where a Quarantinable Communicable
7 Disease Exists, 85 Fed. Reg. 65,806 (Oct. 13, 2020) (exercising the CDC’s power under
8 42 U.S.C. §§ 265, 268 to suspend the introduction of migrants into the United States to
9 protect public health).

10 56. DHS insists that it lacks the resources to control the surge of migrants at the
11 border. But, as explained in ¶¶ 7-10 *supra*, these circumstances are of Defendants’ own
12 making.

13 57. Indeed, one district court has already found expressly that DHS acted in bad
14 faith by affirmatively degrading its detention capacity while at the same time claiming that
15 resource constraints justified lax immigration policies that violate the clear commands of
16 statute: “on this point about insufficient resources and limited detention capacity, the Court
17 finds that the Government has not acted in good faith. Throughout this case, the
18 Government has trumpeted the fact that it does not have enough resources to detain those
19 aliens it is required by law to detain. The Government blames Congress for this deficiency.
20 At the same time, however, the Government has submitted two budget requests in which it
21 asks Congress to cut those very resources and capacity by 26%. Additionally, the
22 Government has persistently underutilized existing detention facilities. To say that this is
23 incongruous is to say the least.” *Texas v. United States*, --- F.Supp.3d ----, 2022 WL
24 2109204, at *30 (S.D. Tex. June 10, 2022), *cert. granted before judgment*, No. 22A17 (22-
25 58), 2022 WL 2841804 (U.S. July 21, 2022) (citations omitted).

1 58. The November Memo announced a drastic expansion of DHS’s use of its
2 parole authority and the July Memo continued and accelerated that expansion.

3 59. The government granted parole to 95,191 migrants in September 2022 alone
4 under this policy.

5 60. The November and July Memos violate 8 U.S.C. § 1182.

6 61. In addition, those memos significantly affected rights and obligations and at
7 a minimum required notice and comment. *See Long Island Care at Home, Ltd. v. Coke*,
8 551 U.S. 158, 172–73, (2007); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-303 (1979).

9 62. Furthermore, Arizona has a non-statutory cause of action to challenge the
10 government’s unlawful, ultra vires conduct, which does indeed “survive[] displacement by
11 the APA.” *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996) (citing
12 *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690–91 (1949)).

13
14 RESPECTFULLY SUBMITTED this 15th of November, 2022.

15
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24
25
26

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all Defendants, who have appeared, are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ James K. Rogers
*Attorney for Plaintiffs Mark Brnovich, in his
official capacity as Attorney General of Arizona;
and the State of Arizona*